IP 04-0396-M 1 F US v Jointer
Magistrate Kennard P. Foster Signed on 5/17/05

NOT INTENDED FOR PUBLICATION IN PRINT

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| UNITED STATES OF AMERICA, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | CAUSE NO. IP 04-0396M-01 |
| JOHN WAYNE JOINTER, | ) | |
| | ) | |
| Defendant. | ) | |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| Plaintiff, | ) | |
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| JOHN WAYNE JOINTER, | ) | |
| | ) | |
| Defendant. | ) | |

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a criminal complaint issued on December 14, 2004, with three counts of distribution of 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack", a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(iii) and one count of possession with intent to distribute 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(iii). On May 9, 2005, at the initial appearance, the government filed a written motion for detention pursuant to Title 18 U.S.C. §§3142(e), (f)(1)(C), (f)(2)(A), and (f)(2)(B) on the grounds that the defendant is charged with a drug trafficking offense where the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, the defendant is a serious risk of flight, if released, and if released there is a serious risk the defendant will obstruct or attempt to

obstruct justice, or threaten injure, or intimidate prospective witnesses.. The detention hearing was held on May 11, 2005. The United States appeared by Barry D. Glickman, Assistant United States Attorney. Mr. Jointer appeared in person and by his appointed counsel, James C. McKinley, Assistant Federal Community Defender.

At the preliminary hearing, the defendant did not contest the existence of probable cause and presented no other evidence. Consequently, the Court found that the evidence constituted probable cause to believe that the defendant committed the crimes charged in the complaint. The charges in the criminal complaint give rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant will not be a serious risk to flee if released.

At the detention hearing, counsel for the defendant called Anita Jointer, the defendant's mother, as a witness and examined her on all issues before the Court. In rebuttal, the Government called Metropolitan Drug Task Force Detective Barbara Maxey. The defendant did not rebut either the presumption that he is a danger to the community or the presumption that he is a risk of flight and, consequently, was ordered detained.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant, John Wayne Jointer is charged in a criminal complaint issued on December 14, 2004, with three counts of distribution of 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack", a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(iii) and one count of possession with intent to distribute 5 grams or more of a

mixture or substance containing a detectable amount of cocaine base, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(iii).

2. The penalty for each count of distribution and possession with intent to distribute 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a)(1), is a mandatory minimum sentence of five (5) years and a maximum of forty (40) years imprisonment. Title 21 U.S.C. § 841(b)(1)(B)(iii).

3. The Court takes judicial notice of the criminal complaint in this cause. The Court further incorporates the evidence admitted during the preliminary hearing and the detention hearing, as if set forth here.

4. At the preliminary hearing, the defendant did not contest the existence of probable cause and presented no other evidence. Consequently, the Court found that the evidence constituted probable cause to believe that the defendant committed the crimes charged in the complaint.

5. The Court finds there is probable cause for the offenses the defendant is charged with in the complaint, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. Title 18 U.S.C. § 3142(e).

6. At the detention hearing, counsel for the defendant called Anita Jointer, the defendant's mother, as a witness and examined her on all issues before the Court. In rebuttal, the Government called Metropolitan Drug Task Force Detective Barbara Maxey.

7. The Court admitted a Pre-Trial Services Report (PS3) regarding Mr. Jointer on the issue of his release or detention. Mr. Jointer is age 22 (DOB 12-13-82). The PS3 indicates the following:

(A) On May 13, 2003, he was convicted of Theft and Receiving Stolen Property, a Class D Felony, in Marion County, Indiana. He was sentenced to 365 days jail, (363 days executed, 2 days suspended) and was placed on probation for 363 days. His probation was subsequently revoked and he was sentenced to an additional 300 days jail.

(B) On February 28, 2005, he was convicted of Possession of Cocaine in Marion County, Indiana. He was given an alternative misdemeanor sentence of 180 days jail executed.

The PS3 also indicates that the defendant has a history of substance abuse and has failed to appear for a Court proceeding.

8. The defendant has failed to rebut the presumption that he is a serious risk of flight, and a danger to the community and any other person. Therefore, John Wayne Jointer is ORDERED DETAINED.

9. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony

where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, Title 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. Title18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(C), (f)(2)(A) and (B), and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. Title 18 U.S.C. §3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985);

*United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is "reasonable assurance"; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

10. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants' appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, Title 21 U.S.C. §801 *et seq.*; the Controlled Substances Import and Export Act, Title 21 U.S.C. §951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. §1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) Title 18 U.S.C. §924(c); (3) Title18 U.S.C. §956(a); or (4) Title 18 U.S.C. §2332b. Title 18 U.S.C. §3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required

and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a §3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

11. If Mr. Jointer had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. In November of 2004, law enforcement officers from the Metropolitan Drug Task Force (MDTF) received information that Jointer was selling large amounts of crack cocaine on the eastside of Indianapolis. On three separate occasions in November and December of 2004, MDTF Detective Jason Bradbury, working in an undercover capacity, made controlled purchases of a total of 46.4 grams of crack cocaine from Jointer. Each of these controlled purchases were audio and videotaped. During the last controlled buy on December 2, 2004, Jointer threatened Bradbury by stating that if the police came down on him, Jointer would kill Bradbury and go to jail for murder and dope.

b. On December 10, 2004, Detective Bradbury placed a consensually monitored telephone call to Jointer. During the call to Jointer Bradbury asked Jointer for two ounces of crack cocaine. Jointer told Bradbury to meet him at an auto parts store located at 38th Street and Shadeland Avenue.

c. Jointer, who was driving a Ford Escort, was stopped by Indianapolis Police Department Sergeant Paul McDonald. When Sgt. McDonald asked Jointer to place his hands behind his back, Jointer shoved Sgt. McDonald and attempted to escape by fleeing on foot. Jointer was momentarily caught by Sgt. McDonald and IPD Officer Keith Hartman. Jointer fought with the police officers and was again able to escape. Jointer was caught a short distance away after he ran across the roadway into oncoming traffic and accidently struck by an assisting MDTF officer's police vehicle.

d. A search of the immediate area around Jointer revealed approximately 22.18 grams of crack cocaine. Additionally, a search warrant was executed at Jointer's

residence located at 5239 Butler Terrace and revealed an additional 10.84 grams of crack cocaine.

e. On December 13, 2005, Jointer gave a statement to law enforcement agents in which he admitted that had purchased between four and five kilograms of cocaine since 2001. Jointer said that he cooks the cocaine into crack in his apartment. Jointer also indicated that he had thirty grams of crack on his person at the time of his arrest and that he began tossing the crack out of his pockets while he was running from the police.

f. The evidence demonstrates a strong probability of conviction.

g The mandatory minimum sentence of five (5) years for each felony drug offense, when coupled with the defendant's threat to kill the undercover police officer in this case, and the defendant's failure to appear for a past court proceeding, substantially increases the seriousness of his risk for flight and demonstrates the dangerousness of the defendant.

The Court having weighed the evidence regarding the factors found in Title18 U.S.C. §3142(g), and based upon the totality of evidence set forth above, concludes that even though the defendant has rebutted one of the presumptions in favor of detention, he nevertheless, should be detained, because he is a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, John Wayne Jointer is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with

defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this 17th day of May, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

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